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HO HUP CONSTRUCTION COMPANY BHD

v.

BUKIT JALIL DEVELOPMENT SDN BHD & ORS (NO 2)

B

HIGH COURT MALAYA, KUALA LUMPUR
MAH WENG KWAI JC
[SUIT NO: D-22NCC-792-2010]
4 AUGUST 2011

C

COMPANY LAW: *Directors - Duties - Directors authorised company to hand over de facto control and beneficial ownership of major land bank to third party for development - Approval of company in general meeting not obtained - Whether transaction amounted to 'disposal of substantial portion of company's property' - Whether disposal void for breach of*

D

s. 132C Companies Act 1965 - Whether directors breached statutory, fiduciary and common law duties

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The first defendant ('BJDSB') and the eleventh defendant ('PHSB') entered into a Joint Development Agreement ('JDA') to develop a 60-acre piece of land ('the land') belonging to BJDSB. The land had a market value of about RM157m and formed a substantial portion of BJDSB's assets. PHSB was to be the sole developer of the land. Pursuant to the JDA, BJDSB executed an irrevocable Power of Attorney ('PA') in favour of PHSB and, at the same time, an Endorsement and Undertaking ('EU') was executed by the plaintiff in favour of PHSB undertaking not to interfere with the performance of the JDA. The plaintiff held 70% of the shareholding in BJDSB. At all material times, the plaintiff's directors were the second to the eighth defendants. The third, ninth and tenth defendants and two nominees of another shareholder company were the directors of BJDSB. At an Extraordinary General Meeting, the plaintiff removed the second to the seventh defendants from its Board of Directors ('BOD') for acting in support of the JDA and PA. The plaintiff then filed the instant action both in its own right against all the defendants as well as by way of a derivative action as a shareholder of BJDSB against all the other defendants for the benefit of BJDSB. The plaintiff's reason for the derivative action was that at the date of filing of the instant action, BJDSB's *de facto* control was in the hands of, among others, the third, ninth and tenth defendants, all of whom were in favour of the JDA.

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The plaintiff sought (i) a declaration that the JDA, PA and EU were void under s. 132C(3) of the Companies Act 1965 ('the Act') (ii) an order that PHSB account for all benefits received or accrued under the JDA, PA and EU and pay such benefits over to BJDSB (iii) the removal of a caveat lodged by PHSB on the land and (iv) damages to be assessed against the second to the eleventh defendants with interest and costs.

The plaintiff complained that (i) BJDSB had been committed to the JDA for an improper purpose (ii) the JDA was not to the company's benefit or interest (iii) the directors had not obtained approval from the company in a general meeting for disposal of the land as required by s. 132C(1)(b) of the Act (iv) the second to eighth defendants as directors of the plaintiff and the third, ninth and tenth defendants as directors of BJDSB had acted in bad faith and breached their fiduciary duties in causing BJDSB to enter into the JDA and (v) PHSB had knowingly assisted the second to tenth defendants to act in bad faith and breach their fiduciary duties to their respective companies.

Held (allowing the claim against the second to eighth defendants and against PHSB, dismissing the claim against the ninth and tenth defendants and dismissing with costs the derivative action against the third, ninth and tenth defendants as directors of BJDSB):

(1) The JDA and PA amounted to a 100% assignment and disposal of BJDSB's interest in the land to PHSB. The transaction was void pursuant to s. 132C(3) of the Act as it was a disposal of a substantial portion of BJDSB's property without the approval of the company and the plaintiff in a general meeting. It followed that the JDA, PA and EU were void. (para 27)

(2) Although BJDSB had not transferred its legal ownership of the land to PHSB, it had for all intents and purposes lost its beneficial ownership. *De facto* control of the land had been vested in PHSB which enjoyed the sole and exclusive rights to the development. This devolution of 'beneficial ownership' amounted to a disposal of the land. (paras 24 & 25)

(3) At the date of filing of the instant suit, the third, ninth and tenth defendants did not have *de facto* control of BJDSB. By then, the plaintiff was in full control of any general meeting of BJDSB, if convened. The new BOD of BJDSB could have

A resolved to have the company commence an action in its own right against the second to eleventh defendants. The plaintiff therefore could not maintain its claim by way of a derivative action against those defendants for BJDSB's benefit as the action was flawed due to the requirement of the 'proper B plaintiff rule'. (paras 43, 44 & 46)

(4) The second to eighth defendants had breached their fiduciary, statutory and common law duties to the plaintiff in having authorised BJDSB to enter into the JDA. (para 69)

C **(5)** PHSB knew the plaintiff and BJDSB were insolvent and had internal disputes. It took advantage of the situation by entering into the JDA with reckless disregard to the interests of the plaintiff and BJDSB. PHSB's conduct was commercially and legally unacceptable. It knowingly assisted the second to D eighth defendants to breach their fiduciary, statutory and common law duties as directors of the plaintiff. (para 81)

(6) At all material times after the JDA had been entered into, PHSB held the land as constructive trustee for BJDSB and E made itself accountable to BJDSB and the plaintiff under the trust as it had knowingly assisted in the improper purpose or design on the part of the second to eighth defendants. (para 84)

F *[The second to eighth defendants and PHSB have filed Notices of Appeal against the decision.]*

Cases referred to:

Abdul Rahim Aki @ Mohd Haki v. Krubong Industrial Park (Melaka) Sdn Bhd & Ors [1995] 2 CLJ 553 ***(refd)***

G *Baden & Others v. SG Developpement du Commerce SA [1992] 4 All ER 161 Ch D* ***(refd)***

Biala Pty Ltd & Anor v. Mallina Holdings Ltd (No 2) [1993] 11 ACLC 1082 ***(refd)***

In re City Equitable Fire Insurance Company Limited [1924] 1 Ch 407 CA ***(refd)***

H *In Re Kie Hock Shipping (1971) Pte Ltd [1985] 1 MLJ 411* ***(refd)***

Johnson v. Gore Wood & Co [2001] 1 All ER481 ***(refd)***

Mohd Shuaib Ishak v. Celcom (M) Bhd [2008] 1 LNS 314 HC ***(refd)***

Primex Investments Ltd v. Northwest Sports Enterprise [1995] Can LTI 717 (BC SC) ***(refd)***

I *Prudential Assurance Company Ltd v. Newman Industries Ltd (No 2) [1982] 1 Ch 204* ***(refd)***

Re Margart Pte Ltd v. Westpac Banking Corp [1985] BCLC 314 ***(refd)***
Senior Anonson & et al v. Harry Lewis (Supreme Court of Delaware Case No: 203, 1983) ***(refd)***
Tan Guan Eng & Anor v. Ng Kweng Hee & Ors [1991] 3 CLJ 1881; [1991] 4 CLJ (Rep) 74 HC ***(refd)***
Tenaga Nasional Bhd v. Ong See Teong & Anor [2010] 2 CLJ 1 FC ***(refd)***

Legislation referred to:
Companies Act 1965, ss. 132C(1)(a)(b), (2), (3), 145, 153, 176, 354(1)
Electricity Supply Act 1990, s. 13

For the plaintiff - Malik Imtiaz Sarwar; (Yoong Nim Chor & Jeninie Gill with him); M/s Yoong & Partners
For the 2nd defendant - S Suhendran; (William Leong & SL Yap with him); M/s William Leong & Co
For the 3rd, 9th & 10th defendants - Azhar Azizan Harun; (Wong Mun Ho with him); M/s Cheang & Ariff
For the 4th-8th defendants - Harold Tan; (Rosey Lim with him); M/s Skrine
For the 11th defendant - Ooi Huey Ling; (Alvin Tang & Janice Yap with her); M/s Ranjit Ooi & Robert Low

Reported by Ashok Kumar

JUDGMENT

Mah Weng Kwai JC:

[1] On 16 March 2010 a Joint Development Agreement (JDA) was entered into between the 1st and 11th defendants for the development of a 60 acre piece of freehold land (the Land) in Kuala Lumpur. The Land belongs to and is the core and last asset of the 1st defendant (and of plaintiff's group of companies). The 11th defendant was to be the sole developer of the project.

[2] The shareholders of the 1st defendant are the plaintiff (together with Ho Hup Equipment Rental Sdn Bhd) (70%) and Zen Courts Sdn Bhd (Zen Courts) (30%). The 11th defendant is a wholly owned subsidiary of Malton Bhd (Malton).

[3] The directors of the plaintiff at all material times were the 2nd to 8th defendants while the 3rd, 9th and 10th defendants and two others nominated by Zen Courts were the directors of the 1st defendant.

[4] Pursuant to the JDA, an irrevocable Power of Attorney (PA) dated 16 March 2010 was executed by the 1st defendant in favour of the 11th defendant. On the same day, an Endorsement and Undertaking (EU) was executed by the plaintiff in favour of the 11th defendant essentially undertaking not to interfere with the performance of the JDA.

[5] The directors of the 1st defendant resolved to enter into the JDA and to execute the PA at a Board of Directors (BOD) meeting held on 17 March 2010 and agreed to have the JDA back dated to 16 March 2010. The directors of the plaintiff also resolved to execute the EU at a BOD meeting held on 17 March 2010 and similarly agreed to have the EU back dated to 16 March 2010.

[6] The 2nd to 7th defendants were removed from the BOD of the plaintiff at its extraordinary general meeting held on 17 March 2010 afternoon, after the (former) BOD had resolved to execute the JDA and to grant the irrevocable PA.

The Plaintiff's Claim

[7] The plaintiff commenced this suit firstly in its own right against all the defendants. The plaintiff's main complaint was that the 1st defendant had been committed to the JDA which was entered into with the 11th defendant for an improper purpose. The JDA was not in the best interest of nor to the benefit of the 1st defendant and the plaintiff and accordingly the plaintiff sought to declare the JDA, the PA and EU void under s. 132C(3) of the Companies Act 1965.

[8] The plaintiff's claim is premised *inter alia*, on the following grounds:

(a) that the JDA contravened s. 132C(1) in that the approval of both the shareholders of the plaintiff and the 1st defendant was not obtained when such approval ought to have been sought or obtained in a general meeting before the JDA was entered into as the value of the Land came within the provisions of s. 132C(1A) and (1B) of the Act respectively;

(b) that the 2nd to 8th defendants who were the directors of the plaintiff and the 3rd, 9th and 10th defendants who were the directors of the 1st defendant had acted in bad faith and

breached their fiduciary duties to the plaintiff and the 1st defendant respectively in causing the 1st defendant to enter into the JDA;

(c) that the 2nd to 10th defendants conspired to injure the plaintiff and the 1st defendant by causing the 1st defendant to enter into the JDA and;

(d) that the 11th defendant knowingly assisted the 2nd to 10th defendants to act in bad faith and to breach their fiduciary duties to the plaintiff and the 1st defendant respectively.

[9] The plaintiff also commenced this suit by way of a derivative action as a shareholder of the 1st defendant against all the other defendants for the benefit of the 1st defendant. This was because, as contended by the plaintiff, that as at the date of the filing of the writ of summons and statement of claim, the *de facto* control of the 1st defendant was in the hands of the 3rd, 9th and 10th defendants and two others nominated by Zen Courts, as directors of the 1st defendant. The plaintiff contended that it would not have been in the interests of the 3rd, 9th and 10th defendants to seek the remedies on behalf of the 1st defendant now sought by the plaintiff in this claim.

[10] Besides seeking to declare the JDA, PA and EU void, the plaintiff also sought an order that the 11th defendant account for all the benefits received or accrued under the JDA, PA or EU by way of a verifying affidavit and to pay such benefits to the 1st defendant. The plaintiff also sought to remove the caveat lodged by the 11th defendant on the Land with the Registrar of Land Titles, Kuala Lumpur. The plaintiff further claimed for damages to be assessed against the 2nd to 11th defendants together with interest and costs.

Main Issues To Be Determined By The Court

[11] The main issues to be decided by the court after the full trial were:

(i) whether the JDA amounted to a disposal of the Land under s. 132C;

(ii) whether the disposal had been approved by the company in a general meeting;

A (iii) whether the disposal is void under s. 132C(3);

(iv) whether the plaintiff could bring this action in its own right;

(v) whether the plaintiff could bring this action by way of a derivative action for the benefit of the 1st defendant;
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(vi) whether the 2nd to 8th defendants are liable for breaches of their fiduciary duties as directors of the plaintiff;

(vii) whether the 3rd, 9th and 10th defendants are liable for
C breaches of their fiduciary duties as directors of the 1st defendant; and

(viii) whether the 11th defendant is liable for knowingly assisting the 2nd to 10th defendants to breach their fiduciary duties as directors of the plaintiff and the 1st defendant respectively.
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Decisions Of The Court

[12] Upon hearing the testimony of six witnesses called by the plaintiff and of two witnesses called by the defence in a full trial
E that lasted 14 days and upon reading the comprehensive written submissions of counsel for the plaintiff and counsel for all the defendants and upon hearing the oral submissions of counsel aforesaid, the court allowed all the prayers in the statement of claim against the 2nd to 8th defendants as directors of the plaintiff
F and the 11th defendant. The claim by the plaintiff against the 3rd, 9th and 10th defendants as directors of the 1st defendant was dismissed with costs. No decision was made by the court on the alleged tort of conspiracy to injure the plaintiff by the defendants as this claim was abandoned by the plaintiff. It was not an agreed
G issue to be tried filed by the plaintiff and in any event no evidence was led on this in the course of the trial.

The Appeals

[13] Being dissatisfied with the decision of the court, the 2nd,
H 3rd, 4th to 8th and 11th defendants have filed their respective notices of appeal. No appeal has been filed by the plaintiff in the dismissal of the case in its own right against the 9th and 10th defendants and against the 3rd, 9th and 10th defendants by way of a derivative action.
I

Reasons For The Decisions

Disposal Of The Land

[14] For a careful consideration of s. 132C(1)(b) and s. 132C(3), it will be useful to set out the provisions of the section here in full.

[15] Section 132C provides:

> **Approval** of company required for disposal **by directors** of company's undertaking or property.
>
> (1) Notwithstanding anything in the memorandum or articles of association of the company, the directors shall not carry into effect any arrangement or transaction for:
>
> (a) the acquisition of an undertaking or property of a substantial value; or
>
> (b) the **disposal** of a **substantial portion** of the company's undertaking or property,
>
> unless the arrangement or transaction has been **approved** by the company in a **general meeting.**
>
> (1A) For the purpose of subsection (1), in the case of a company where all or any of its shares are listed for quotation on the official list of a Stock Exchange as defined in the Securities Industry Act 1983, the term 'substantial value' or 'substantial portion' shall mean the **same value prescribed** by the provisions in the listing requirements of the Exchange:
>
> (a) which relates to acquisitions or disposals by a company or its subsidiaries to which such provision applies; and
>
> (b) which would require the approval of shareholders at a general meeting in accordance with the provisions of such listing requirements.
>
> (1B) In the case of any company other than a company to which subsection (1A) is applicable, an undertaking or property shall be considered to be of a substantial value and a portion of the company's undertaking or property shall be considered to be a substantial portion if:
>
> (a) its value exceeds **twenty-five per centum** of the total assets of the company;

A (b) the net profits (after deducting all charges except taxation and excluding extraordinary items) attributed to it amounts to more than twenty-five per centum of the total net profit of the company; or

B (c) its value exceeds twenty-five per centum of the issued share capital of the company.

whichever is the highest.

(2) The court may, on the application of any member of the company, restrain the directors from entering into a transaction in C contravention of subsection (1).

(3) Where an arrangement or transaction is carried into effect in contravention of subsection (1), the arrangement or transaction shall **be void** except in favour of any person dealing with the company for valuable consideration and without actual notice of D the contravention.

(4) This section shall not apply to proposals for disposing of the whole or substantially the whole of the company's undertaking or property made by a receiver and manager of any part of the E undertaking or property of the company appointed under a power contained in any instrument or by a Court or a liquidator of a company appointed in a voluntary winding up.

(5) Any director who contravenes the provision of this section shall be guilty of an offence against this Act.

F Penalty: Imprisonment for five years or thirty thousand ringgit or both.

(6) In this section, "director" includes the chief executive officer, the chief operating officer, the chief financial G controller or any other person primarily responsible for the operations or financial management of a company, by whatever name called.

[16] The burden is on the plaintiff to prove that there has been H a breach of s. 132C and as a result the JDA is a void agreement. Section 132C(1)(b) essentially prohibits the directors of a company from disposing off a substantial portion of the company's property without first obtaining the company's approval in a general meeting for such a disposal. It is not in dispute between the parties that I no approval was obtained at a general meeting of the 1st defendant and the plaintiff for the JDA. It is also not in dispute that the Land is of substantial value or forms a substantial portion of the 1st defendant's assets.

[17] The Land as stated is the last major asset of the 1st defendant and is the key to uplifting the plaintiff from its affected listed issuer PN 17 status issued by Bursa Malaysia. According to the 2nd defendant the market value of the Land, estimated by the valuers, M/s Henry Butcher, is about RM157 million (see Valuation Report dated 10 January 2010 in Bundle B1 at p. 410). While it is true that there was no purchase of the Land by the 11th defendant, the court is of the view that when the JDA, the PA and the EU are taken together and read cumulatively, they amount to a "disposal" coming within the scope of s. 132C(1)(b).

[18] Under the JDA, the 11th defendant was granted the sole and exclusive rights to develop the Land in such a manner that the 1st defendant has lost all control over and interest in the Land. The JDA and PA have vested *de facto* control over the Land to the 11th defendant. In effect, the 1st defendant has lost all discretion on the development and sale of the Land. The 1st defendant has divested all its rights in the Land which may be said to be akin to a sales and purchase of the Land with the 1st defendant to receive the "price" through deferred payments. In the words of DW9, Ooi Ah Heong, "the 1st defendant had in effect surrendered the Land to Malton to do what it pleases".

[19] In so far as the plaintiff is concerned the value of the JDA, taken at the minimum value of RM265 million, as against the net assets of the plaintiff group of companies of – RM15.9 million, would be well above the 25% threshold stipulated in s. 132C(1A). (The net assets value is based on the accounts for financial year ending 31 December 2009 as announced to Bursa Malaysia on 25 February 2010).

[20] Under the irrevocable PA, the 11th defendant has vast and unfettered powers to act like the owner of the Land, including the power to charge the Land to the intended financier/s of the purchaser/s.

[21] The 1st defendant had also undertaken to indemnify the 11th defendant against all claims if any, made by third parties in connection with the Land and/or development prior to the execution of the JDA thereby safeguarding the interests of the 11th defendant. The 11th defendant is also entitled to seek the remedy of specific performance against the 1st defendant in the event of any breach/es by the 1st defendant.

[22] By lodging the private caveat on the Land on 18 March 2010 the 11th defendant has in effect asserted its right to title or interest in the Land. The caveat was lodged notwithstanding there is no contractual provision for the 11th defendant to do so under the JDA.

[23] And in return, all that the 1st defendant is entitled to under the JDA is 17% of the Gross Development Value (GDV) of the Land less the deposit sum of RM500,000 paid by the 11th defendant to the 1st defendant and moneys paid by the 11th defendant to CIMB Bank Bhd the chargee, on behalf of the 1st defendant, amounting to about RM265 million to be paid by the 11th defendant over a period of ten plus five years without any guarantee as to when these monies would actually be paid. There is no schedule of payments provided for in the JDA. Without a specific time frame for payment by the 11th defendant it meant that there was no determination of the Net Present Value (NPV) of the payment. It would appear that the directors failed to consider the impact of the NPV on the 17% of the GDV of the Land.

[24] It would thus appear that the 1st defendant under the JDA and PA, which is irrevocable, had effectively transferred the "beneficial ownership" of the Land to the 11th defendant. The 11th defendant will be the developer of the project on the Land and will be in charge of sales and purchasers. The 1st defendant is obliged to execute all documents as and when required to do so by the 11th defendant and must execute documents and plans including surrendering the title to the Land for sub-division and transfer to purchasers. The JDA has allowed the 11th defendant to literally step into the shoes of the 1st defendant. The court is of the view that in the circumstances of the case, this devolution of "beneficial ownership" amounts to a disposal of the Land. The JDA can be equated to a sale based on a percentage of the GDV of the Land where payment is to be made on a deferred basis. Support for this contention can be found in the case of *Re Margart Pte Ltd v. Westpac Banking Corp* [1985] BCLC 314 where Helsham CJ is quoted as saying:

> This is another way of stating in legal terms the proposition that the word "disposition", when used with reference to property, normally has the meaning of connoting a change in the beneficial ownership of an asset by transfer or other type of dealing …

[25] No doubt in this case, the 1st defendant has not transferred its legal ownership to the 11th defendant but it has for all intents and purposes lost its beneficial ownership. *De facto* control of the Land had been vested in the 11th defendant which enjoyed the sole and exclusive rights to the development. In the case of *Tan Guan Eng & Anor v. Ng Kweng Hee & Ors* [1991] 3 CLJ 1881; [1991] 4 CLJ (Rep) 74, Edgar Joseph Jr J (as he then was) held that the traditional view of "control" of a company is one of ownership but the new view considers who has *de facto* control of a company. Similarly, when determining who has control over the Land pursuant to the terms of the JDA, the test to be applied is not who has "ownership" of the Land but rather who has *de facto* control over the development of the Land.

[26] When defining the word "disposal" to include the transfer of beneficial ownership of the Land, the court is of the view that Parliament must have had intended to construe a "disposal" in a wider sense, such as to include the transfer of beneficial ownership and not just restricted to the transfer of legal ownership, otherwise the learned Parliamentary Draftsman would have had no difficulty in using the words "sale and purchase of a property" in s. 132C(1)(b).

[27] The court held as a matter of fact and law that the JDA and PA amounted to a 100% assignment and disposal of the 1st defendant's interest in the Land to the 11th defendant. And as the disposal of the Land was a disposal of a substantial portion of the 1st defendant's property without the approval of the 1st defendant and the plaintiff in a general meeting, the transaction was void pursuant to s. 132C(3). It follows thus that the JDA, the PA and the EU are void. The rationale for the need for approval for the disposal at a general meeting of the company is obvious. It is to safeguard shareholders' interest and when this is not obtained, it will be in breach of s. 132C(1)(b) (and chapter 10 of the Bursa Malaysian Main Market Listing Requirements). And pursuant to the EU executed by the plaintiff in favour of the 11th defendant, the hands of the plaintiff were effectively tied from "interfering" with the JDA in any manner.

[28] In the present case, the plaintiff is a 70% shareholder of the 1st defendant and as a member of the company could have applied to restrain the directors of the 1st defendant under the provisions of s. 132C(2), from entering into a transaction which is in contravention of s. 132C(1)(b).

[29] Although the plaintiff did not take steps to restrain the directors of the 1st defendant from entering into the JDA, the court is of the view that since it has the power and jurisdiction to restrain the directors of the 1st defendant from entering into the JDA under s. 132C(2), the court certainly has the power and jurisdiction under s. 132C(1) to prevent the directors of the 1st defendant and the plaintiff from carrying into effect any transaction envisaged under s. 132C(1)(b). The intention to carry the JDA into effect became a reality when the former BOD of the plaintiff and Malton both made public announcements to Bursa Malaysia during lunch time on 17 March 2010 to that effect.

[30] It is incumbent upon the court to adopt a purposive approach in the interpretation of the word "disposal" under s. 132C(2) read with s. 132C(1)(b), to include a transaction which by itself is not an outright disposal by way of a sale and purchase agreement, but a transaction such as the JDA which by its nature would have the effect of a disposal and a significant impact on the company and its members.

[31] James Foong FCJ in his dissenting judgment in *Tenaga Nasional Bhd v. Ong See Teong & Anor* [2010] 2 CLJ 1 when interpreting the word "upgrading" in the context of s. 13 of the Electricity Supply Act 1990 held that "in interpreting a particular word in a certain section of a legislation, it is imperative to look at the intention of the provision as a whole rather than in isolation". And it is clear that the intention of s. 132C(1)(b) as a whole is to protect the interest of shareholders in a company.

[32] The *Concise Oxford Dictionary* (7th edn.) defines the word "disposal" to mean "disposing of, getting rid of; settling, dealing with; bestowal, assignment; sale; control, management". By the JDA, the 1st defendant was irrefragably assigning the right to develop the Land to the 11th defendant. The 1st defendant had in fact handed over the control and management of the Land for development to the 11th defendant in return for the 17% of the GDV of the Land. The dictionary meaning of "disposal" envisages a wider interpretation of the word rather than a restrictive one.

[33] In the circumstances, the court held the JDA was void as it amounted to a disposal of the Land without the approval by the 1st defendant and the plaintiff in a general meeting.

Plaintiff Suing In Its Own Right

[34] The court is of the view that the plaintiff has a cause of action to commence this case in its own right against the 2nd to 8th defendants as directors of the plaintiff for breaches of their fiduciary, statutory and common law duties when they consented to the 1st defendant entering into the JDA without first obtaining the approval of the company in a general meeting.

[35] The plaintiff's cause of action in its own right against the 11th defendant is essentially based on the 11th defendant's complicity in the events leading to the execution of the JDA and being an accessory in law to the impugned transaction. The role of the 11th defendant and its position in law will be dealt with later in this judgment.

[36] En Azhar Azizan Harun, counsel for the 3rd, 9th and 10th defendants argued that as the plaintiff had pleaded its case in the amended statement of claim, in its own right **and** by way of derivative action, instead of using the words "and/or", the plaintiff must now prove **both** its rights to sue ie, in its own right **and** by way of a derivative action before it can succeed in its claim against the defendants for damages. The court however does not agree with this contention. This is because each claim is mutually exclusive of the other and what this means in effect is that the plaintiff is relying on two separate causes of action. With the amendment and although the plaintiff is no longer claiming in the alternative against the defendants it does not mean that the plaintiff must prove both its claims to succeed in either of them. Although the conjunctive word "and" has been used, it does not mean that if the plaintiff cannot prove its case by way of derivative action it must necessarily fail in its claim commenced in its own right.

[37] Counsel for the 3rd, 9th and 10th defendants also contended that the plaintiff cannot commence the claim in its own right as it does not have a proprietary right over the Land owned by the 1st defendant and that the plaintiff is not in a position to suffer any loss or damage from whatever wrongful act committed concerning the Land. While the court agrees that the plaintiff being a shareholder, cannot assert a cause of action which the 1st defendant has, the court cannot agree with the above contention of counsel as it overlooks the statutory right of the

plaintiff under s. 132C(2) read with s. 132C(1)(b) to commence this action. The plaintiff obviously believes that the JDA is not in the interests of both the 1st defendant and of itself and seeks to have it declared void. No doubt the plaintiff does not have a proprietary right as it is not the registered owner of the Land but any real or even perceived loss suffered or to be suffered by the 1st defendant will give rise to a cause of action to the plaintiff as it is a majority 70% shareholder of the 1st defendant. In other words it is a right limited to its shareholding.

Plaintiff Suing By Way Of Derivative Action

[38] The plaintiff contended that the 1st defendant was under the control, directly and/or indirectly, of the 3rd, 9th and 10th defendants, the majority directors of the 1st defendant who would not seek the remedies sought in this claim as it would not be in their interests to do so. The plaintiff also alleged that the 3rd, 9th and 10th defendants were at all material times aligned to the 2nd defendant and/or to the 4th to 8th defendants in support of the JDA. The plaintiff contended that it is in the interest of justice for the plaintiff to commence this claim by way of a derivative action for the benefit of the 1st defendant.

[39] It is trite that a plaintiff must comply with the "proper plaintiff rule" when commencing an action as decided by the Court of Appeal in the case of *Abdul Rahim bin Aki @ Mohd Haki v. Krubong Industrial Park (Melaka) Sdn Bhd & Ors* [1995] 2 CLJ 553 and in the case of *Johnson v. Gore Wood & Co* [2001] 1 All ER481. An exception to this general principle is the derivative action. Justice Gopal Sri Ram JCA (as he then was) in Abdul Rahim Aki summarized the derivative action as follows:

> … It is based upon the premise that the company which has been wronged is unable to sue because the wrongdoers are themselves in control of its decision making organs and will not, for that reason, permit an action to be brought in its name …

[40] The issue to be determined by the court was whether at the time of the filing of the writ of summons and statement of claim by the plaintiff on 26 April 2010, the 1st defendant was under the *de facto* control of the 3rd, 9th and 10th defendants as the majority directors of the BOD or whether the plaintiff had effective control over the 1st defendant. (See *Biala Pty Ltd & Anor v. Mallina Holdings Ltd* (No 2) [1993] 11 ACLC 1082, a decision of the

Supreme Court of Western Australia which discussed the fourth exception to the rule in *Foss v. Harbottle* and applied the test in a derivative claim in the case of *Prudential Assurance Company Ltd v. Newman Industries Ltd (No 2)* [1982] 1 Ch 204 (per Vinelott J).

[41] To determine this issue the court had to consider the chronology of events that unfolded after the EGM of the plaintiff held on 17 March 2010.

[42] At the said EGM, the 2nd to 7th defendants were removed as directors of the plaintiff. The 8th defendant resigned on 9 July 2010. So, as far as the plaintiff was concerned, the 2nd to 7th defendants, the wrongdoers, were no longer in control of the plaintiff. And the plaintiff was firmly in control of any general meeting of the 1st defendant, being the majority shareholder. Being in the saddle, the plaintiff could have easily convened an EGM of the 1st defendant to remove the 3rd, 9th and 10th defendants after 17 March 2010 under s. 153 CA and art. 69 of the memorandum and articles of the 1st defendant by ordinary resolution with a simple majority, if it had wanted to do so.

[43] Instead, the plaintiff attempted to remove the 3rd, 9th and 10th defendants by way of letter dated 9 April 2010. (See bundle B4 at pp. 455 to 460 and 461 to 465). This seemed rather academic as the 3rd defendant had earlier resigned as a director on 1 April 2010 and the 9th and 10th defendants had "left" the office of the 1st defendant towards the end of March 2010, presumably also having resigned as directors. In any event by 9 April 2010, the 3rd, 9th and 10th defendants seemed to have accepted their removal as directors. New directors could have been appointed in their place. Thus, by 9 April 2010, at the latest, the plaintiff was in full control of any general meeting of the 1st defendant, if convened. The new BOD of the 1st defendant could then have resolved to have the 1st defendant commence an action in its own right against the 2nd to 11th defendants. This the 1st defendant did not do and instead, the plaintiff went on to file the writ of summons and statement of claim on 26 April 2010 by way of a derivative action for the benefit of the 1st defendant.

[44] As can be seen from the above, the 3rd, 9th and 10th defendants did not have *de facto* control of the 1st defendant as at 26 April 2010, the date of the filing. The plaintiff's contention that it did not have control of the BOD of the 1st defendant until

the 3rd, 9th and 10th defendants were removed as directors at an EGM held on 10 May 2010, cannot be accepted as the 3rd, 9th and 10th defendants had "resigned" much earlier or they could have been removed soon after the 17 March 2010 or the 9 April 2010.

[45] The fact that the plaintiff's new nominee directors did have control of the BOD of the 1st defendant after 17 March 2010 can be seen in the following two events. The first was on 29 March 2010 when the 1st defendant held meetings of the BOD and shareholders to approve the sale of a piece of land and the second was on 29 March 2010 as well to apply for a restraining order under s. 176 CA.

[46] In the circumstances the court is of the considered view that the plaintiff cannot maintain its claim by way of a derivative action against the 2nd to 11th defendants for the benefit of the 1st defendant as the derivative action is flawed due to the requirement under the proper plaintiff rule.

[47] Thus, the plaintiff, although the 70% shareholder of the 1st defendant, cannot commence an action to enforce the claims of the 1st defendant through the derivative action. An action must be brought in the name of the 1st defendant itself, as it was in a position to do so soon after 17 March 2010 or at the latest after 9 April 2010.

Liability Of The 2nd To 8th Defendants For Breaches Of Duties As Directors Of The Plaintiff

[48] The plaintiff contended that the 2nd to 8th defendants had breached their fiduciary, statutory and common law duties to the plaintiff and had acted in bad faith and against the interest of the plaintiff by agreeing to allow the 1st defendant to enter into the JDA with the 11th defendant without the prior approval of the 1st defendant or the plaintiff in a general meeting. In doing so the 2nd to 8th defendants had acted *ultra vires* their powers.

[49] For a determination of the discharge of duties of directors of a company, useful reference can be made to the case of *In re City Equitable Fire Insurance Company Limited* [1924] 1 Ch 407 CA where Romer J succinctly describes it as "In discharging those duties, a director (a) must act honestly, and (b) must exercise such degree of skill and diligence as would amount to the

reasonable care which an ordinary man might be expected to take, in the circumstances, on his own behalf. But, (c) he need not exh. in the performance of his duties a greater degree of skill than may reasonably be expected from a person of his knowledge and experience; in other words, he is not liable for mere errors of judgment; (d) he is not bound to give continuous attention to the affairs of his company; his duties are of an intermittent nature to be performed at periodical board meetings, and at meetings of any committee to which he is appointed, and though not bound to attend all such meetings he ought to attend them when reasonably able to do so; and (e) in respect of all duties which, having regard to the exigencies of business and the articles of association, may properly be left to some other official, he is, in the absence of grounds for suspicion, justified in trusting that official to perform such duties honestly."

[50] And in the case of *In Re Kie Hock Shipping (1971) Pte Ltd* [1985] 1 MLJ 411, Sinnathuray J of the Singapore High Court held "that in discharging his duties, a director must act honestly and must exercise such degree of skill and diligence as would amount to the reasonable care which an ordinary man might take, in the circumstances, on his own behalf".

[51] The liability of the 2nd to 8th defendants for breaches of duties as directors of the plaintiff will be considered in light of the above mentioned cases.

The Position Of The 2nd Defendant As Director Of The Plaintiff

[52] The 2nd defendant was at all material times the Deputy Executive Chairman of the plaintiff. Simply put, the 2nd defendant's position was that since the JDA did not amount to a disposal of the Land by the 1st defendant, there was no requirement to obtain the approval of the 1st defendant and the plaintiff at a general meeting to comply with s. 132C(1)(b); that there was no unlawful conduct on the part of the 2nd defendant and there was no breach of duties as a director of the plaintiff. The 2nd defendant further contended that the directors of the plaintiff were at all times motivated to rescue the plaintiff from being delisted by Bursa Malaysia and relied on the five critical issues canvassed by counsel on his behalf. The five critical issues relied on by the 2nd defendant are as follows:

A (i) to avoid being delisted under Bursa Malaysia PN17 the plaintiff had to submit its Regularisation Plan by 4 April 2010;

(ii) the plaintiff and the 1st defendant had to show they had the necessary funds to develop the Land and to overcome the
B accumulated losses of about RM110 million;

(iii) the plaintiff and the 1st defendant had to propose a schedule of repayments for the outstanding loans of about RM101 million owing to banks;

C (iv) the plaintiff and the 1st defendant had to settle outstanding liquidated ascertained damages in the sum of about RM23 million to the 1st defendant's purchasers; and

(v) the plaintiff and the 1st defendant had to find end financing
D for 47 units of shop offices, failing which the 1st defendant would have to refund amount RM8 million deposit collected.

[53] It is not disputed that the plaintiff and the 1st defendant were at all material times facing serious financial challenges. But
E the primary issue in this case is not whether the JDA was a good deal or a bad deal for the 1st defendant and the plaintiff or whether it would be able to help lift the plaintiff from its PN17 status but whether the JDA was void for being in contravention of the provisions of s. 132C.

F **[54]** It will be further noted that the five critical issues relied on by the 2nd defendant all concerned the financial position of the plaintiff and the gloomy prospect that the plaintiff would be delisted if it did not come up with an acceptable regularisation plan promptly, but none of the critical issues could justify a breach
G of s. 132C.

[55] The 2nd defendant contended that as he was away in Jakarta from 13 March 2010 to 16 March 2010, he had no part to play in the decision made by the BOD at the meeting held
H 16 March 2010. The court considered the explanation given by the 2nd defendant that as he was away in Jakarta on the day the BOD of the plaintiff met he was therefore not responsible for the decision to enter into the JDA as being too simplistic to be accepted. It is in evidence that the talks between the plaintiff, led
I by the 2nd defendant and the Malton group had been on going for the past two years before the JDA was signed. The 2nd

defendant was in the thick of negotiations and he knew or ought to have known of the terms of the JDA and that the JDA would be executed on the 17 March 2010. The 2nd defendant was committed to having the 1st defendant enter into the JDA with the 11th defendant for self interest through his share holding in Extreme System Sdn Bhd, a shareholder of the plaintiff. It was not for a proper purpose. No doubt the 2nd defendant was not physically present at the BOD meeting but it is obvious that he was the puppet master pulling the strings in the background. In these days of modern telecommunications, the 2nd defendant would have had no difficulties whatsoever in keeping in touch with the 3rd defendant, the group managing director of the plaintiff, on the events leading to the execution of the JDA. Indeed, it may be said that the 2nd defendant's visit to Jakarta was a flight of convenience to give the impression that he had nothing to do with the JDA.

[56] The evidence adduced at trial further proved that of the directors of the 1st defendant, the 3rd defendant in particular had colluded with the 2nd defendant to promote the 2nd defendant's self interest as an indirect shareholder of the plaintiff through Extreme System Sdn Bhd. It will be noted that the 3rd defendant was appointed director of the 1st defendant on the recommendation of the 2nd defendant. The evidence of the 3rd defendant together with the other directors, pressing on with the finalisation of the JDA late into the evening of 16 March 2010 (up to 9pm before the final draft JDA was prepared, according to the evidence of DW9 Ooi Ah Heong), the urgency and haste in entering the JDA and the grant of the PA on 17 March 2010, the backdating of the JDA to 16 March 2010 and the support shown for the EU to be issued by the plaintiff, all go to show that the 3rd defendant was actively "working" with the 2nd defendant to achieve their objectives. It will be noted that the BOD meeting on 16 March 2010 was convened orally at very short notice by the 3rd defendant. The 2nd defendant was the unseen hand acting behind the scene. He was responsible for coordinating the positions of the 3rd, 9th and 10th defendants with his own position.

[57] Counsel for the 2nd defendant, Mr Suhendran, contended that it was not for the court to consider whether the JDA was a good or bad deal for the plaintiff as it was a "commercial decision" and that the court cannot intervene or interfere with the decision

taken by the BOD of the plaintiff to enter into the JDA. While the court is mindful that it must not concern itself with whether "the deal was good or bad", the court has a duty to perform and that is to determine whether the deal amounted to a disposal of the Land without the requisite shareholders' approval at a general meeting. The court did consider the test of whether the conduct of the 2nd defendant was for the benefit of the plaintiff and in the best interests of the shareholders. Unfortunately, the court found that the conduct of the 2nd defendant did not pass muster and did not live up to the legal expectations.

[58] It cannot be denied that the 2nd defendant and the other directors of the plaintiff (the 3rd to 7th defendants) all knew that they were to be removed as directors at the EGM to be held on 17 March 2010. Notice calling for the EGM had been given by two requisitionists on 11 February 2010 under s. 145 CA with the principal purpose of removing the 2nd to 7th defendants as directors of the plaintiff. The resolution was passed at 4.45pm that day. The court accepted the contention of the plaintiff that the 2nd to 7th defendants in particular the 2nd and 3rd defendants knew they would be removed as the evidence in support of this can be seen when a cheque for the 2nd defendant's termination benefits had been prepared on 12 March 2010. The decision taken by the 3rd defendant and the others on 16 March 2010 to enter into the JDA was to pre-empt the decision to be taken at the EGM to remove them as directors.

[59] The 2nd defendant, knowing he would be removed at the EGM also knew that amongst others, Low Tuck Choy and Lee Aik Chong would be appointed as the new directors. The dislike, disdain even, of Low Tuck Choy and Lee Aik Chong by the 2nd defendant came piercing through in evidence when he referred to them as the "2 Crooks". The 2nd defendant knowing that the "2 Crooks" would be in the new BOD did what he had to do to pre-empt the actions of the new BOD by having the 1st defendant enter into the JDA and to present a *fait accompli* to the new board. The 2nd defendant's concern arose as a result of his own indirect shareholding in the plaintiff. The 2nd defendant's priority was to commit the 1st defendant to the JDA otherwise his interest as a indirect shareholder of the plaintiff would be adversely affected. The 2nd defendant did not act as a matter of business judgment for the benefit of the plaintiff but

rather for his own self interest. He knew that if the "2 Crooks" were appointed as directors of the plaintiff, there would be no JDA with the 11th defendant!

[60] The JDA was entered into with unholy haste. Entering into the JDA was inconsistent with the advice of M/s Newfields and M/s Aminvest, the advisors of the plaintiff. It is quite obvious that the 2nd defendant and the other directors could not wait till after the EGM on 17 March 2010 as it would have been too late to implement their scheme. Although the 2nd defendant did say in evidence that the signing of the JDA was very urgent yet he conceded that the plaintiff could have held on for another two to three days. As at 16 March 2010 the financial position of the plaintiff did not appear to be too critical as the 1st defendant was in receipt of a sum of about RM8 million from the launch of the first phase of shop houses.

[61] Another indication of the lack of good faith on the part of the 2nd and 3rd defendants was when they decided to pay themselves termination benefits of about RM1 million before they were removed as directors. Although the cheques were dated 16 March 2010, they were signed on 12 March 2010. This sum of RM1 million was over and above the sum of RM50,000 paid to the 3rd defendant and RM55,000 paid to the 2nd defendant as "incentive bonus" in January 2010.

Position Of The 3rd Defendant As Director Of The Plaintiff

[62] Counsel for 3rd defendant Mr Wong Mun Ho contended that the 3rd defendant did not breach any of his duties as a director of the plaintiff as he had acted in good faith and in the best interests of the plaintiff when the JDA was entered into. However, the court holds otherwise.

[63] As pointed out earlier, the 3rd defendant was the Group Managing Director of the plaintiff and was answerable to the 2nd defendant. All that he said and did as a director of the plaintiff was with the understanding and agreement of the 2nd defendant. For the reasons discussed in para. 6.3 above on "disposal of the Land" and the findings made against the 2nd defendant, the court held that the 3rd defendant was in breach of his duties in particular in breach of the business judgment rule as a director of the plaintiff when he failed to comply with the provisions of s. 132C(1)(b).

[64] It is without doubt that the 3rd defendant had colluded with and acted in complicity with the 2nd defendant. The 3rd defendant enjoyed a close relationship with the 2nd defendant and was responsible for undertaking the efforts to procure the JDA. The 3rd defendant was tasked with negotiating the terms of the JDA with the 11th defendant and Malton especially when the 2nd defendant was away in Jakarta from 13 March 2010 to 16 March 2010. The 3rd defendant in turn had instructed the 9th defendant to prepare a paper for the BOD meeting held on 16 March 2010.

[65] The urgency and timing of the JDA, apart from its viability, were indicative of the lack of *bona fides* on the part of the 3rd and 2nd defendants, as alleged by the plaintiff.

Position Of The 4th To 8th Defendants As Directors Of The Plaintiff

[66] The 4th to 7th defendants were the independent non-executive directors of the plaintiff and were members of the Audit Committee, with the 6th defendant as the Chairman of the Committee, while the 8th defendant was the non independent non executive director of the plaintiff.

[67] Counsel for 4th to 8th defendants Mr Harold Tan contended that they had acted "independently, honestly and in good faith for a proper purpose" when agreeing to enter into the JDA. Counsel further contended that they had carried out their duties with reasonable care, skill and diligence in the best interest of the plaintiff.

[68] Again, the court was not prepared to accept the contention that the 4th to 8th defendants had acted in the best interest of the plaintiff or that they had acted with reasonable care, skill and diligence within the ambit of s. 132C(1A). It is in evidence that these five directors essentially stayed at the sidelines and were quite happy and content to let matters be driven by the 2nd and 3rd defendants prior to 16 March 2010 and by the 3rd defendant on the date when the BOD resolved to have the 1st defendant execute the JDA with the 11th defendant. It was not just a matter of business judgment on whether the 1st defendant should enter into the JDA with the 11th defendant. The 4th to 8th defendants acted without asking any questions at the meeting on 16 March 2010. They did not consider the impact of the NPV on the 17% of the GDV of the Land. It would appear that the

4th to 8th defendants did not act as independent directors and had instead given up their responsibility to the 2nd and 3rd defendants who were acting in collusion with each other.

[69] It was incumbent upon the 4th to 8th defendants as directors, to avail themselves of all material information and to ask the necessary questions. To be able to act in good faith and for a proper purpose the defendants must not turn a blind eye (or worse, to close their eyes altogether) to the surrounding facts and circumstances during the BOD meeting before deciding to commit to the JDA. When the defendants' actions are not *bona fide* but are self-serving the defendants cannot rely on the business judgment rule. They cannot be said to be acting in good faith and in the best interest of the company.

[70] The test of good faith was discussed in the case of *Mohd Shuaib Ishak v. Celcom (M) Bhd* [2008] 1 LNS 314 (Kuala Lumpur High Court Originating Summons No: D5-24-20-2008) by Ramly Haji Ali J (now JCA) who applied the test dealt with by the Supreme Court of British Columbia in *Primex Investments Ltd v. Northwest Sports Enterprise* [1995] Can LTI 717 (BC SC).

[71] And in the case of *Senior Anonson & et al v. Harry Lewis* (Supreme Court of Delaware Case No: 203, 1983) it was held that "to invoke the business judgment rule's protection directors have a duty to inform themselves, prior to making a business decision, of all material information reasonably available to them. Having become so informed, they must then act with requisite care in the discharge of their duties". The court held for reasons discussed below, that the 4th to 8th defendants could not avail themselves of the protection under the business judgment rule.

[72] At the BOD meeting on 16 March 2010, all that the 4th to 8th defendants did was to rely on the paper presented by the 9th defendant, who was not even a director of the plaintiff and on the legal opinion of M/s Lee Hishamuddin Allen & Gledhill dated 3 February 2010 which at best was a qualified opinion. No cash flow analysis resulting from the JDA was presented nor asked for. No questions were asked on how the NPV would impact on the 17% GDV and no questions were asked as to how the CIMB Bank loan was to be serviced. It would appear that the 4th to 8th defendants were quite content to leave these serious issues to be handled by the "management" which of course comprised of the 2nd and 3rd defendants.

[73] The 4th to 8th defendants did not query how the JDA would help the plaintiff to fit into the PN17 regularisation plan which had to be submitted to Bursa Malaysia by the 4 April 2010 dateline, nor as to why the JDA was inconsistent to the regularisation plan announced to Bursa Malaysia and to the statements contained in the letter of 12 March 2010 (bundle B1 at p. 322). No explanation was given by the 3rd and 9th defendants on the drastic change of position by committing to the JDA. Further, not even a draft of the formal resolution to be passed was presented to the BOD for discussion and none was asked for. And importantly, no questions were asked as to how the proposed removal of the 2nd to 7th defendants as directors at the EGM to be held on 17 March 2010, the very next day, would impact on the decision to enter into the JDA. By the time the BOD meeting was held, all the directors would have known of the order of the court, delivered at about 3.15pm, dismissing the application for an injunction to restrain the EGM from being held on 17 March 2010.

[74] The 4th to 8th defendants had a choice to reject the proposed JDA but did not do so. Instead they chose to endorse the recommendation of the 3rd and 9th defendants without any reservation.

[75] The 4th to 8th defendants acted in breach in their duties in having authorized the plaintiff to enter into the JDA and the EU on 16 March 2010 when it was not in the best interests of the plaintiff. And in the words of the 2nd defendant himself the JDA and EU were described as "unique" documents.

[76] The court cannot agree with counsel that the decision of the BOD of the plaintiff taken on 16 March 2010 was a business decision/judgment within the meaning of s. 132C(1B) and that the court should be slow to interfere with the decision. As discussed earlier, the issue here is not one of whether the JDA was a good or bad deal for the plaintiff (and the 1st defendant) but rather whether there has been a breach of s. 132C(1)(b) when the Land was disposed without the approval as required.

[77] Considering the circumstances of the case in detail and as a whole, the court was not prepared to relieve the 4th to 8th defendants from liability, wholly or partly, under s. 354(1) CA. The court was not convinced that they had acted honestly and reasonably to excuse them from their liability for their breaches of duties.

Position Of The 3rd, 9th And 10th Defendants As Directors Of The 1st Defendant

[78] The court having held that the plaintiff did not have a cause of action by way of a derivative action against the defendants for the benefit of the 1st defendant, went on to hold that the 3rd, 9th and 10th defendants cannot be held liable for any alleged breaches of duties as directors of the 1st defendant. The suit against them by way of a derivative action was thus dismissed with costs.

The Case Against The 11th Defendant Of Having "Knowingly Assisted"

[79] The evidence adduced during the trial clearly showed that the 11th defendant and its holding company, Malton only wanted to deal with the 2nd defendant and the old BOD. They simply did not want to deal with the new BOD after the EGM on 17 March 2010. This was clearly established when the 3rd defendant in his evidence quite callously said that the 11th defendant and Malton would "walk away" if the former directors were no longer in office.

[80] The 11th defendant and Malton knew that shareholders approval was required at a general meeting of members because the thresholds under s. 132C(1A) and (1B) had been reached under the terms of the JDA.

[81] The 11th defendant and Malton knew of the financial status of the plaintiff and the 1st defendant. They knew that the plaintiff and the 1st defendant were insolvent. The 11th defendant would have had actual notice, if not constructive notice at least, of the internal disputes faced by the plaintiff and the 1st defendant. And the 11th defendant took advantage of the situation by entering into the JDA with the 1st defendant. The 11th defendant acted with reckless disregard to the interests of the plaintiff and the 1st defendant. The 11th defendant's conduct was commercially and legally unacceptable. The 11th defendant took advantage by knowingly assisting the 2nd to 8th defendants to breach their fiduciary, statutory and common law duties as directors of the plaintiff. The 11th defendant's conduct was not *bona fide* and was an accessory in law to the breaches committed by the 2nd to 8th defendants the directors of the plaintiff.

[82] It is trite that the 2nd to 8th defendants as directors of the plaintiff are trustees of the assets of the plaintiff. They should not commit a breach of trust by failing to act in good faith and for a proper purpose. They did this by committing to the JDA and the 11th defendant being the other party in the JDA, had knowingly assisted the directors to commit a breach of that trust. The 11th defendant clearly had knowledge of the trust and that the 2nd to 8th defendants had acted for an improper purpose.

[83] In the case of *Baden & Others v. SG Developpement du Commerce SA* [1992] 4 All ER 161 Ch D, Peter Gibson J held that even a stranger to a trust could make himself accountable as constructive trustee to the beneficiaries under the trust if he knowingly assisted in a fraudulent design on the part of the trustee.

[84] Here, in the present case it has been abundantly established by the plaintiff that the 11th defendant at all material times after the JDA had been entered into was holding the Land as constructive trustee for the 1st defendant and that the 11th defendant made themselves accountable to the plaintiff and the 1st defendant, under the constructive trust as the 11th defendant had knowingly assisted in the improper purpose or design on the part of the 2nd to 8th defendants.

[85] The complicity of the 11th defendant in the scheme was best described by DW9 Ooi Ah Heong, when he (inadvertently) said in his evidence that "it was a fair deal for the 1st defendant and the 11th defendant did not care whether there was a breach of duties or not". This bit of evidence aptly sums up the state of mind of the players behind the 11th defendant and Malton. They turned a blind eye to the legal requirements for fear of losing a good business deal and opportunity.

[86] The damage caused to the 1st defendant and the plaintiff is obvious. It resulted in the core asset of the 1st defendant being tied up in the JDA. And with the caveat lodged by the 11th defendant on 18 March 2010 just two days after the JDA was entered into, clearly shows that the 11th defendant was claiming an interest in the Land to the exclusion of the 1st defendant and the plaintiff.

[87] In the result the agreed issues to be tried were answered as follows:

Issue	Decision
1. Whether the plaintiff ("Ho Hup") has *locus standi* to bring and/or maintain this action as a derivative action for and on behalf of the 1st Defendant ("Bukit Jalil").	No
2. Whether shareholder approval by Ho Hup and/or Bukit Jalil was required under s. 132C Companies Act 1965 in respect of the Joint Development Agreement dated 16 March 2010 ("JDA").	Yes
3. Further, whether the effect of the JDA, either on its own or in combination with the Power of Attorney dated 16 March 2010 constituted a disposal of the Land within the meaning of s. 132C(1)(b), (1A) and/or (1B) Companies Act 1965.	Yes
4. Whether the 2nd to 8th defendants, and each of them, breached their statutory duties and/or fiduciary duties and/or duties at common law to Ho Hup in having authorised Bukit Jalil to enter the JDA.	Yes
5. Whether the 3rd, 9th and/or 10th defendants as directors of Bukit Jalil breached their statutory duties and/or fiduciary duties and/or duties at common law to Bukit Jalil in having authorised Bukit Jalil to enter the JDA.	Not liable because no derivative cause of action by the plaintiff.
6. Whether the 11th defendant ("PHSB") knowingly assisted the directors of Ho Hup and/or Bukit Jalil, or any one of them, in breaching their duties (if such breach is determined by this Honourable Court).	Yes

7.	Whether Ho Hup has a cause of action for knowing assistance as against PHSB.	Yes
8.	Whether the 4th to 8th defendants are entitled to rely on s. 354, Companies Act 1965 and, if so, whether the said defendants are excused from any negligent default, breach of duty or breach of trust on their part (if proven by Ho Hup) pursuant to the said section.	No